UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MILTON DIAZ,
Individually and on Behalf of All Others Similarly Situated,

Plaintiff,

v.

ELECTRONICS BOUTIQUE OF AMERICA INC. and ELECTRONICS BOUTIQUE HOLDING CORP.,

Defendants.

Civil Action No.: 04-CV-0840E(Sr)

# DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

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## PRELIMINARY STATEMENT

In this action, Plaintiff Milton Diaz ("Plaintiff") claims that he, along with other similarly-situated employees, was denied wages and overtime in violation of the federal Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq. Plaintiff also seeks to bring a Rule 23 class claim for wages and unpaid overtime under the New York Labor Law. Defendants Electronics Boutique of America and Electronics Boutique Holding Corp. ("EB") respectfully submit this Memorandum of Law in support of their Motion to Dismiss. As demonstrated below, the Court should dismiss Plaintiff's state law class claim.

As an initial matter, Plaintiff's claim for overtime pay under the New York Labor Law should be dismissed because "New York does not have a mandatory overtime law." Hornstein v. Negev Airbase Constructors, 488 N.Y.S.2d 435, 437 (2d Dep't 1985). While the Commissioner of Labor has promulgated a regulation purporting to create an overtime law, that regulation is invalid because "the legislative branch of government cannot cede its fundamental policy-making responsibility to an administrative agency". Boreali v. Axelrod, 71 N.Y.2d 1, 9 (1987). The Commissioner's regulation is also invalid because it improperly incorporates a federal statute and federal regulations as they change from time to time in the future. Utah League of Insured Sav. Ass'ns v. State, 555 F. Supp. 664, 674 (D. Utah 1983) ("[I]t is universally held that an incorporation by state statute of rules, regulations, and statutes of federal bodies to be promulgated subsequent to the enactment of the state statute constitutes an unlawful delegation of legislative power.")

Even if Plaintiff's substantive claims could somehow survive, however, Plaintiff's class claim under the New York Labor Law should still be dismissed as a matter of law because it runs afoul of the Rules Enabling Act (the "REA"), which provides that rules of practice and procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). First, Plaintiff's class claim abridges EB's rights under CPLR § 901(b), which prohibits bringing a class claim where the statute under which the suit is brought provides for a "penalty." Plaintiff may not maintain his class claim under the New York Labor Law because that law "provides for liquidated damages and does not contain the necessary clause allowing these damages to be recovered in a class-action." Carter v. Frito-Lay, Inc., 425 N.Y.S.2d 115, 116 (1st Dep't 1980), aff'd, 52 N.Y.2d 994 (1981). Additionally, Plaintiff's state law class claim runs afoul of the REA because Rule 23 of the Federal Rules of Civil Procedure (providing for opt-out class actions) is directly at odds with § 216(b) of the FLSA, which limits the scope of representative actions for overtime pay by requiring individuals to affirmatively opt into the lawsuit. Indeed, the authors of Rule 23 expressly recognized this conflict and concluded that Rule 23 must give way to § 216(b). See Fed R. Civ. P. 23 Adv. Comm. Notes.

Furthermore, Plaintiff's state law class claim is preempted by federal law because it "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992), in enacting the FLSA. The adjudication of Plaintiff's claim as an opt-out class action interferes with Congress's intention to put an end to representative, opt-out class actions for unpaid wages and overtime pay by requiring plaintiffs asserting such claims to affirmatively "opt in" to such lawsuits. For all these reasons, Plaintiff's state law claim should be dismissed.

## STATEMENT OF FACTS

Plaintiff, a former, non-exempt Assistant Store Manager at EB filed this action on October 13, 2004. He claims that EB failed to pay him and a class of similarly-situated individuals wages and overtime compensation in violation of the FLSA and the New York Labor

Law. (Compl. ¶¶ 43, 45.) Plaintiff proposes to bring an opt-in collective action under the FLSA on behalf of all current and former Store Managers and Assistant Store Managers who worked in any of EB's 1,460 stores nationwide in the past three years, and at the same time, bring an opt-out Rule 23 class action under the New York Labor Law. (Id. ¶13.)[1]

## ARGUMENT

## I. PLAINTIFF'S CLAIM FOR OVERTIME SHOULD BE DISMISSED BECAUSE THERE IS NO OVERTIME STATUTE IN NEW YORK AND THE COMMISSIONER OF LABOR EXCEEDED HIS AUTHORITY IN ATTEMPTING TO CREATE ONE BY REGULATION.

Plaintiff's state law claim for overtime in this action should be dismissed for two reasons. First, the New York Commissioner of Labor exceeded his authority by attempting to create an overtime law when it is the State Legislature that is vested with sole authority to create the law. Second, and in any event, the Commissioner's overtime regulation is invalid because it improperly incorporates a federal statute and federal regulations as they change from time to time in the future.

### A. The Commissioner Exceeded His Authority By Attempting To Create An Overtime Law.

Plaintiff's claim for overtime under Article 19 of the New York Labor Law, titled the Minimum Wage Act, must be dismissed because "New York does not have a mandatory overtime law." Hornstein v. Negev Airbase Constructors, 448 N.Y.S.2d 435, 437 (2d Dep't 1985); see also Gallegos v. Brandeis Sch., 189 F.R.D. 256, 259 (E.D.N.Y. 1999) (citation omitted) ("New York does not have a mandatory overtime law."); Ballard v. Cmty. Home Care Referral Serv., Inc., 695 N.Y.S.2d 130, 131 (2d Dep't 1999) ("There are no provisions governing

[1] For all the reasons stated in EB's February 18, 2005 opposition to Plaintiff's motion for conditional certification and notice, the Court should not allow Plaintiff to proceed with a collective action under the FLSA.

overtime compensation in the New York State Labor Law."). As these courts have recognized, the New York Labor Law establishes no substantive obligation to pay overtime; nor does the Labor Law contain a definition of a standard work week or a standard work day – concepts which are necessary to any statutory obligation to pay overtime.[2]

Instead of requiring overtime pay, the Minimum Wage Act merely alludes to the possibility that a wage board might recommend "overtime or part-time rates" when making recommendations for wage orders to the Commissioner of Labor. See N.Y. Labor Law § 655(b). Seizing upon Section 655(b)'s seeming invitation, the Commissioner has promulgated a regulation – entitled "Overtime rate" – which provides in pertinent part:

> An employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's regular rate in the manner and methods provided in and subject to the exemptions of sections 7 and 13 of 29 U.S.C. § 201 et seq., the Fair Labor Standards Act of 1938, as amended . . . .

[2] Contrast the absence of an overtime obligation in the Minimum Wage Act with the overtime laws of other states, which are not only express legislative enactments, but also reflect different policy judgments about what the overtime law should be. See, e.g., CAL. LABOR CODE § 511(b) (2004) ("An overtime rate of compensation of no less than double the regular rate of pay of the employee shall be paid for any work in excess of 12 hours per day and for any work in excess of eight hours on those days worked beyond the regularly scheduled workdays."); ME. REV. STAT. ANN. Labor and Industry § 664 (2003) ("An employer may not require an employee to work more than 40 hours in any one week unless 1 1/2 times the regular hourly rate is paid for all hours actually worked in excess of 40 hours in that week."); OR. REV. STAT. § 652.020 (2003) ("[E]mployees may work overtime not to exceed three hours in one day, conditioned that payment be made for said overtime at the rate of time and one-half the regular wage"); MICH. COMP. LAWS § 408.384a (2004) ("[A]n employee shall receive compensation at not less than 1-1/2 times the regular rate at which the employee is employed for employment in a workweek in excess of 40 hours."); MINN. STAT. § 177.25 (2004) ("No employer may employ an employee for a workweek longer than 48 hours, unless the employee receives compensation for employment in excess of 48 hours in a workweek at a rate of at least 1-1/2 times the regular rate at which the employee is employed."); N.C. GEN. STAT. § 95-25.4 (2004) ("Every employer shall pay each employee who works longer than 40 hours in any workweek at a rate of not less than time and one half of the regular rate of pay of the employee for those hours in excess of 40 per week."); OHIO REV. CODE ANN. § 4111.03 (2004) ("An employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's wage rate for hours worked in excess of forty hours in one workweek.").

N.Y. Comp. Codes Rules & Regs. tit. 12, § 142-2.2 ("NYCCRR"). By virtue of this regulation, the Commissioner purports to create an overtime law for the State of New York.

Under the New York State Constitution, however, "the legislative power of this state shall be vested in the senate and assembly." N.Y. Const. Article III, Section 1. As the Court of Appeals has held, the Legislature makes the fundamental policy decisions for residents and businesses in this State: "the legislative branch of government cannot cede its fundamental policy-making responsibility to an administrative agency." Boreali v. Axelrod, 71 N.Y.2d 1, 9 (1987) (invalidating 10 NYCCRR part 25); see also Health Ins. Ass'n of Am. v. Corcoran, 551 N.Y.S.2d 615 (3d Dep't 1990) (invalidating 11 NYCCRR 52.27), aff'd, 76 N.Y.2d 995 (1990). Even where an administrative agency operates under a "broad enabling statute," an agency cannot "stretch[ ] that statute . . . as a basis for drafting a code embodying its own assessment of what public policy ought to be." Boreali, 71 N.Y.2d at 9.

While the Legislature can authorize an administrative agency to "fill in the details" of a statute, an agency cannot make the policy judgment whether to have an overtime law or what its broad parameters should be. Boreali, 71 N.Y.2d at 9. Simply stated, "New York does not have a mandatory overtime law," Hornstein, 448 N.Y.S.2d at 437, and the Commissioner of Labor had no authority to create one "without running afoul of the constitutional separation of powers doctrine." Boreali, 71 N.Y.2d at 14.

### B. The Commissioner's Overtime Regulation Is Invalid Because It Improperly Incorporates A Federal Statute And Federal Regulations As They Change From Time To Time In The Future.

Even assuming *arguendo* that the Commissioner had authority to create a mandatory overtime law, the Commissioner has abdicated his obligations under Article 19 of the Labor Law by delegating his authority to other governmental bodies. See, e.g., Coca-Cola Bottling Co. v. Bd. of Estimate, 72 N.Y.2d 674, 680 (1988) (recognizing that state agencies may not defer or delegate their obligations to other agencies). The Commissioner has incorporated virtually in toto the provisions of the federal FLSA – "sections 7 and 13 of 29 U.S.C. 201 et seq., the Fair Labor Standards Act of 1938, as amended …." 12 NYCCRR § 142-2.2 (emphasis added). Section 13 of the FLSA, in turn, expressly incorporates the regulations of the U.S. Department of Labor – exempting from the federal minimum wage and overtime requirements individuals "employed in a bona fide executive, administrative, or professional capacity … as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor]…." 29 U.S.C. § 213(a)(1) (emphasis added).[3] The Commissioner has improperly delegated rulemaking authority to spell out the terms of a substantive overtime obligation – including matters such as the definition of the standard work week and the exemptions from overtime coverage – to the dictates, present and future, of both Congress and a federal administrative agency.

As the court stated in People v. Mobil Oil Corp., 422 N.Y.S.2d 589 (Nassau Cty. 1979):

> [The County Legislature has] further provided that the provisions of the National Fire Protection Association rules and standards, as amended, shall be deemed a part of the ordinance. By enacting the association's amendments, prior to their adoption, the County of Nassau has delegated to the National Fire Protection Association sovereign and legislative power. … The County has relinquished all control over the ordinance in question pertaining to flammable and combustible liquids to the National Fire Protection Association, and whatever standards may be adopted by that association in the future are automatically the law of the county…. Such a procedure is an improper delegation of legislative authority, and therefore unconstitutional.

Id. at 592; see also Utah League of Insured Sav. Ass'ns, 555 F. Supp. 664, 674 (D. Utah 1983) ("[I]t is universally held that an incorporation by state statute of rules, regulations, and statutes of federal bodies to be promulgated subsequent to the enactment of the state statute constitutes an

[3] Part 541 of the U.S. Secretary of Labor's current FLSA regulations regarding the administrative, executive, and professional exemptions from overtime are twenty pages long and are codified at 29 C.F.R. § 541.0 et seq.

unlawful delegation of legislative power."); State v. Dougall, 570 P.2d 135, 138 (Wash. 1977) (same).

Similarly, in this case, the Commissioner of Labor has ceded control over New York's overtime mandate to Congress and the U.S. Secretary of Labor. By incorporating the FLSA "as amended" and as its terms are "defined and delimited from time to time by regulations of the Secretary [of Labor]," the Commissioner has "relinquished all control" over the overtime regulation and improperly delegated whatever obligations it has to establish and administer the overtime regulation to Congress and to the U.S. Department of Labor. It is simply not proper, and inconsistent with our State Constitution, for the Commissioner to have effectively ceded control over the substantive content of the New York's overtime regulation to the U.S. Secretary of Labor – including present and future regulations of the federal agency that reflect controversial public policy choices.

The Commissioner's delegation of authority is not at all hypothetical. In fact, the U.S. Secretary of Labor's new regulations governing the exemptions to the FLSA (effective August 23, 2004) - which have been extremely controversial - purportedly became the law of New York State automatically, without the New York State Legislature or even the Commissioner of Labor passing on such controversial regulations. See, e.g., Senate Approves Overtime Amendment Limiting Portions of DOL's Final Rule, Daily Lab. Rep. (BNA) No. 86, at AA-1 (May 5, 2004) (detailing Senate's passage of amendment blocking portions of the DOL's "controversial overtime pay rule" from going into effect and noting AFL-CIO's position that DOL was misleading the public about the true scope of the new regulations); see also Robert Crohan, "DOL Publishes Major Changes to 'White Collar' Overtime Rules, Mondaq Bus. Briefing, May

28, 2004, available at 2004 WL 69983397 (characterizing DOL regulations as "highly controversial" and noting Senate amendment to block the regulations' implementation).[4]

Because the Commissioner has exceeded his authority in promulgating 12 NYCCRR § 142-2.2, Plaintiff's claim for overtime pay under that regulation must be dismissed.[5]

## II. PLAINTIFF'S STATE LAW CLASS CLAIM SHOULD BE DISMISSED BECAUSE IT VIOLATES THE RULES ENABLING ACT.

Even if Plaintiff could maintain a claim under the state overtime regulation, his state law class claim should be dismissed because allowing him to maintain that claim under Rule 23 of the Federal Rules would violate the REA, 28 U.S.C. § 2072. The REA provides, in relevant part, that the rules of practice and procedure "shall not abridge, enlarge or modify any substantive right." Id. § 2072(b). The Federal Rules, and in particular Rule 23, create no substantive rights. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613 (1997) ("[We are] mindful that Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act" (citing Fed. R. Civ. P. 82 ("[R]ules shall not be construed to extend . . . the [subject-matter] jurisdiction of the United States district courts.")); see also United States ex rel. Greenville Equip. Co. v. United States Gas Co., 218 F. Supp. 653, 656 (D. Del. 1962) (holding that the Federal Rules of Civil Procedure "as the name indicates, are of a procedural nature, leaving matters of substantive right to be otherwise determined"). Statutory provisions, on the other hand, even those with procedural elements, can confer substantive rights to which the Federal Rules must give way. For example, in Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 426 (1996), the Supreme Court held that CPLR § 5501 governed the standard of review of a federal jury verdict respecting a state law claim, not the standard that typically governed in the federal courts, since the state standard of review was "both 'substantive' and 'procedural.'" Id.; see also Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 555 (1949) ("Rules which lawyers call procedural do not always exhaust their effect by regulating procedure.").

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[4] EB is not taking the position that state law can never incorporate federal law by reference. Rather, EB submits that the Commissioner cannot incorporate federal statutes and regulations as they are amended and changed in the future. Even assuming that the Commissioner could incorporate future federal law and regulations by reference, however, this particular incorporation by reference would still violate the New York Constitution and the New York Executive Law because the Commissioner did not properly file the incorporated federal materials (i.e., the FLSA and its regulations) with New York's Secretary of State. N.Y. Const. art. IV, § 8 ("No rule or regulation made by any state department, board, bureau, officer, authority, or commission . . . shall be effective until it is filed in the office of the department of state."); N.Y. Exec. Law § 102(1) (2005) (specifying that no amendment to any state code, rule, or regulation which includes in the text thereof any United States statute, or code, rule, or regulation, shall be effective unless filed with the secretary of state); see also Jones v. Smith, 64 N.Y.2d 1003, 1006 (N.Y. 1985); N.Y. State Coalition of Pub. Employers v. N.Y. State Dep't of Labor, 60 N.Y.2d 789, 791 (N.Y. 1983). Despite the fact that the Commissioner's regulation incorporating the FLSA and the FLSA's regulations by reference was promulgated effective January 1, 1987, the text of the FLSA was not filed with the New York Secretary of State until July 18, 2000, and the FLSA regulations have never been filed with the Secretary of State. See Affidavit of Adam Price ¶ 3; see also Nasso v. Seagal, 263 F. Supp. 2d 596, 615 (E.D.N.Y. 2003) ("[B]ecause these documents are matters of public record, consideration of these documents [does] not transform the present motion [to dismiss] into a summary judgment motion."); Kramer v. Time Warner, Inc., 937 F.2d 767, 774 (2d Cir. 1991) (holding that the district court did not err by taking judicial notice of the contents of relevant public disclosure documents filed with the SEC in considering defendants' motion to dismiss).

[5] While the Commissioner's regulation is clearly invalid, EB is not claiming that individuals employed in New York are not eligible for overtime at all. New York employees are eligible for overtime pay pursuant to the FLSA, but not pursuant to an invalid State regulation.

Here, Plaintiff's attempt to maintain a state law class claim under Rule 23 violates the REA in two ways. As explained below, it violates the substantive rights conferred by both CPLR § 901(b) and § 216(b) of the FLSA.

### A. Plaintiff's State Law Class Claim Should Be Dismissed Because That Claim Violates CPLR § 901(b).

Plaintiff's state law class claim should be dismissed because it cannot be maintained under the CPLR. Section 901 of the CPLR prohibits the use of a class action under a statute that provides for recovery of a penalty or a minimum measure of recovery. Specifically, subsection (b) of the law states:

> Unless a statute creating or imposing a penalty, or a minimum measure or recovery, specifically authorizes the recovery thereof in a class action, an action to recover a penalty or minimum measure of recovery created or imposed by statute may not be maintained as a class action.

CPLR § 901(b) (emphasis added).

Here, Plaintiff brings a class claim under the New York Labor Law and he seeks, among other things, "compensatory damages, liquidated damages, attorney's fees, costs and disbursements." (Compl. ¶ 47) (emphasis added). Because liquidated damages under the New York Labor Law constitute a penalty within the meaning of CPLR § 901(b), and because the New York Labor Law contains no specific authorization, as required by the CPLR, for a class action to seek such damages, Plaintiff may not maintain his claim as a class action, and permitting him to do so would violate the REA.

The decision in Carter v. Frito-Lay, Inc., 425 N.Y.S.2d 115, 116 (1st Dep't 1980), aff'd, 52 N.Y.2d 994 (1981), is precisely on point. There, the First Department held, in a decision affirmed by the Court of Appeals, that a class claim under the New York Labor Law could not be maintained because the statute "provides for liquidated damages and does not contain the necessary clause allowing these damages to be recovered in a class action."[6] Id. Because Plaintiff is barred from maintaining his state law class claim under CPLR § 901(b), the Court should dismiss his class claim.

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[6] Consistent with this decision, courts in New York have repeatedly rejected class claims brought under the New York Labor Law pursuant to § 901(b). See, e.g., Ballard v. Cmty. Home Care Referral Serv. Inc., 695 N.Y.S.2d 130, 132 (2d Dep't 1999) (holding that "[t]he fact that the plaintiff's complaint [seeking overtime under the New York Labor Law] contains a claim for liquidated damages precludes class action relief" under CPLR § 901(b)); Caruso v. Allnet Communications Servs. Inc., 662 N.Y.S.2d 468, 470 (1st Dep't 1997) (upholding denial of class certification pursuant to CPLR § 901(b)); Parker v. Equity Adver. Agency, Inc., Mar. 10, 1982 N.Y.L.J. 11, (col. 2) (N.Y. County 1982) (finding that CPLR 901(b) precluded Plaintiff from bringing a class action under § 198 of the New York Labor Law).

### B. Plaintiff's State Law Class Claim Should Be Dismissed Because That Claim Violates The Rights Conferred By § 216(b) Of The FLSA.

According to Section 216(b) of the FLSA, an individual has the right to litigate his or her unpaid overtime claims as a party plaintiff and not be bound by a judgment as an absent member of a representative class. E.g., LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286, 288 (5th Cir. 1975) (recognizing that under § 216(b), "no person can become a party plaintiff and no person will be bound by or may benefit from judgment unless he has affirmatively 'opted into' the class…"); Gjurovich v. Emmanuel's Marketplace, Inc., 282 F. Supp. 2d 101, 103-04 (S.D.N.Y. 2003). EB, in turn, has the right to litigate claims for unpaid overtime only against individuals who affirmatively opt into this action as "party plaintiffs" and to not be bound by a judgment with respect to overtime claims belonging to absent members of a representative class. LaChapelle, 513 F.2d at 288; see also Jackson v. City of San Antonio, No. SA-03-CA-49, 2003 WL 23180857, at *5 (W.D. Tex. Dec. 3, 2003) (stating that permitting a Rule 23 state law class action to be joined with an FLSA action would "flaunt the Congressional intention that FLSA claims proceed as an opt-in scheme").

The fact that § 216(b) and Rule 23 are in an "irreconcilable" conflict such that Rule 23 is required to yield under the REA is hardly a novel concept. LaChapelle, 513 F.2d at 288. Even the authors of Rule 23 noted the conflict between Rule 23 and § 216(b) and recognized that Rule 23 must give way. See, e.g., Fed R. Civ. P. 23 Adv. Comm. Notes ("The present provisions of 29 U.S.C. § 216(b) are not intended to be affected by Rule 23 as amended."); see also Prickett v. Dekalb Cty., 349 F.3d 1294, 1296 (11th Cir. 2003) ("Because of this opt-in requirement [under § 216(b)], plaintiffs may not certify a class under Rule 23.").

In this action, allowing Plaintiff to maintain a state law class claim under Rule 23 would directly conflict with the statutory rights of EB to not be bound by a judgment with respect to overtime claims belonging to absent class members. Allowing Plaintiff to maintain a state law class claim under Rule 23 would also directly conflict with the statutory rights of those absent class members to not be bound by a judgment respecting their overtime claims unless they affirmatively opted into the action. Indeed, under principles of res judicata and collateral estoppel, adjudicating the state overtime claim of an absent class member would necessarily adjudicate his or her own FLSA claim. See, e.g., Chao v. A-One Med. Servs., Inc., 346 F.3d 908, 921-22 (9th Cir. 2003) (holding that res judicata precluded Secretary of Labor from bringing claim for damages under FLSA when plaintiff had lost state law claim for overtime wages); see also Tran v. Le French Baker, Inc., No. C-94-0482, 1995 WL 374342, at *2 (N.D. Cal. June 14, 1995) (holding that plaintiff who was previously awarded overtime pay through state administrative proceedings under state law was collaterally estopped from pursuing FLSA claim, even though the "Commissioner did not have jurisdiction to hear the FLSA claim" in those proceedings). Rule 23's class action procedure must give way to the substantive rights conferred by § 216(b). Were it otherwise, Plaintiff would be permitted to sidestep § 216(b) by adjudicating the state law rights of absent class members under Rule 23 and, in turn, binding those absent class members with respect to their FLSA claims.

## III. PLAINTIFF'S STATE LAW CLASS CLAIM SHOULD BE DISMISSED BECAUSE IT IS PREEMPTED BY FEDERAL LAW.

Plaintiff's state law class claim is also subject to dismissal because it is preempted by federal law. A federal statute can preempt state law by virtue of either an express preemption clause or through the doctrine of implied preemption. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987) (holding that a state law is preempted by a federal law, even where the statutes share the same goal, where the state law "interferes with the methods by which the federal statute was designed to reach this goal") (emphasis added). In this case, the pursuit of Plaintiff's state law class claim is preempted under the doctrine of implied preemption. State law remedies are impliedly preempted where the pursuit of the state law claim would conflict with the policy embodied in federal law or where the "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (citation omitted).

Under the doctrine of implied preemption, New York federal and state courts have repeatedly held that even where a federal statute has no express provision regarding the preemption of state law remedies, those state law remedies are preempted by federal law if they conflict with the policies embodied in the federal law. The Second Circuit's decision in Clean Air Markets Grp. v. Pataki, 338 F.3d 82, 87-88 (2d Cir. 2003), aptly demonstrates the application of this doctrine. There, the Court found that the Clean Air Act preempted New York's Air Pollution Mitigation Law ("APML"). Through the Clean Air Act, Congress set up an emission allocation system where utilities were granted a set number of emission allowances annually, which they could sell to "any other person who holds such allowances." Id. at 84. New York State passed the APML, which included a provision that required states that sold their emission allowances to certain "upwind" states to pay New York an amount of money equal to the sale price. Id. at 85. The Second Circuit concluded that this particular provision of the state law was preempted:

> Even where federal and state statutes have a common goal, a state law will be preempted 'if it interferes with the methods by which the federal statute was designed to reach this goal.' There can be no doubt that [the APML] interferes with the method selected by Congress for regulating SO2 emissions.

Id. at 87 (citing Ouellette v. Int'l Paper Co., 479 U.S. 481, 494 (1987)) (emphasis omitted); see also Guice v. Charles Schwab & Co., 89 N.Y.2d 31, 48 (N.Y. 1996) (internal quotation marks and citation omitted) (holding that where a "State's regulation . . . adversely affects the ability of a Federal administrative agency to regulate comprehensively and with uniformity in accordance with the objectives of Congress, then the state law may be pre-empted even though collision between the state and federal regulation may not be an inevitable consequence"); Bantum v. Am. Stock Exch., LLC, 777 N.Y.S.2d 137, 138-40 (2d Dep't 2004) (holding that plaintiff's claims under New York State and City anti-discrimination laws were impliedly preempted by SEC regulations).

As Clean Air, Bantum, and Guice make clear, federal law, such as the FLSA, impliedly preempts state law, such as the Commissioner's overtime regulation, where the enforcement of the state law interferes with the objectives of the federal law or the methods set forth in the federal law to attain those objectives. In this action, Plaintiff's attempt to bring an opt-out class claim for unpaid wages and overtime conflicts with the intent of Congress in amending the FLSA to put an end to representative class actions for unpaid minimum wages and overtime pay by requiring plaintiffs asserting such claims to "opt in" to such lawsuits by filing a written consent. Pub. L. 49, ch. 52 § 61 Stat. 84, 87 (1947). Congress expressly sought to limit the number and scope of representative actions for overtime wages. 29 U.S.C. § 251(b) (emphasis added); La Chapelle, 513 F.2d at 288.

Just as there can be no dispute that Congress chose to limit the number and scope of representative actions for overtime pay and minimum wage violations, there also can be no dispute that adjudicating Plaintiff's state law class claim here would accomplish the exact opposite result Congress intended – i.e., it would expand the scope of representative actions for overtime pay beyond the opt-in vehicle it specifically authorized. As the court in Rochlin states: "[t]he procedures set forth in Section 216(b) preempt the class action procedure set forth in Rule 23." Rochlin v. Cincinnati Ins. Co., 2003 WL 21852341, at *15 n.6 (S.D. Ind. July 8, 2003); see also Madrigal v. Green Giant Co., No. C-78-157, 1981 WL 2331, at *3 (E.D. Wash. July 27, 1981) (dismissing state law class claim which would allow plaintiffs to circumvent the FLSA opt-in procedure; "[i]f such a result were permitted, the statutory requirements of the FLSA would effectively be gutted").

Here, where Plaintiff seeks to bring a purported state law class claim that tracks nearly identical federal substantive standards and exemptions from coverage, any adjudication of the purported state law class claim would foreclose any subsequent suit under the FLSA under principles of res judicata and collateral estoppel. See, e.g., Chao, 346 F.3d at 921-22. Such a resolution necessarily interferes with the Congressional judgment that employees are not to be bound by a representative action brought ostensibly on their behalf by others and their counsel, unless they have affirmatively decided to join the lawsuit. Accordingly, Plaintiff's New York Labor Law class claim should be dismissed as preempted by federal law.[7]

[7] The application of implied preemption to state law wage claims is by no means novel. Courts have previously invoked the doctrine of implied preemption in holding that the FLSA preempts state wage law with respect to the damages available to a plaintiff alleging a claim for unpaid wages. See Berry v. 34 Irving Place Corp., 4 Wage & Hour Cas. (BNA) 564 (S.D.N.Y. 1944) ("The statutory provision of the Fair Labor Standards Act for liquidated damages is designed to compensate for damages resulting from the retention of the workman's pay . . . which otherwise might be 'too obscure and difficult of proof.' Nothing in the statute suggests anything but a legislative intention to provide a uniform rule as to such damages, a rule in no way dependent upon the varying standards and provisions of the several states."); see also Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 698 (1945) (finding that Congress must have intended to preclude the recovery of interest when it enacted the FLSA since an award of liquidated damages serves a similar purpose).

## CONCLUSION

For the foregoing reasons, EB respectfully requests that its motion to dismiss Plaintiff's state law claim be granted, together with such other and further relief as this Court deems just and equitable.

Respectfully Submitted,

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